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No. 82-10

In the Supreme Court of the United States

October Term, 1982

CINCINNATI MILACRON CHEMICALS, INC., et al.,
Petitioners,

—against—

EDWARD BLANKENSHIP, et al.,
Respondents,

MINSTER MACHINE COMPANY,
Petitioner,

—against—

VIRGINIA MAE KNITE,
Respondent,

ST. VINCENT HOSPITAL & MEDICAL CENTER and ELLA AMBATE,
Petitioners,

—against—

ARLENE T. ZAK and THADDEUS O. ZAK,
Respondents.

CASE ON WRIT OF CERTIORARI TO THE SUPREME COURT OF OHIO

RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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QUESTIONS PRESENTED

Respondents frame the issues differently from Petitioner.

1. May a litigant bypass opportunities to move to disqualify a judge and raise the issue of disqualification after the decision is known to be adverse to the litigant, using information *dehors* the record that was available during the earlier stages of the case.

2. May a court presume that all the judicial acts of a prospective candidate for partisan political office are tainted by reason of the declaration of that judge of a future intent to resign the judgeship and become a candidate?

All of the Respondents join in this Memorandum in Opposition to Petition for a Writ of Certiorari. One Memorandum in Opposition has been filed because only one Petition was filed seeking a Writ of Certiorari to review the Judgments of the Supreme Court of Ohio in three separate cases, as provided in this Court's Rule 19.4.

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RESPONDENTS' MEMORANDUM IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

JURISDICTION

Respondents agree that this Court has jurisdiction pursuant to 28 U.S.C. §1257(3) and that the Petition for a Writ of Certiorari was timely filed and is properly before this Court.

STATEMENT OF THE CASE

Respondents disagree with the statement of the case presented by Petitioners. Petitioners' sole factual support for their statement of the case is an unauthenticated press release, never admitted into evidence, which was attached to their motions for rehearing below. The Petition is replete with references to alleged facts *dehors* the record below.

1. Petitioners present a copy of a press release dated January 15, 1982, to demonstrate the candidacy of Chief Justice Celebrezze from that date. This copy is in the record below only by virtue of having been attached to briefs in support of the motions for rehearing filed in the three cases. See Petitioners' Appendix (hereafter Pet. App.) 161. Petitioners present no evidence of its release to the public.

2. The content of the alleged release refers to "plans" to become a candidate for Governor. All references to the candidacy for Governor of Ohio are in the future tense. Petitioners assume that the announcement contains an unequivocal declaration of present candidacy, thereby shortcutting a complex legal issue (whether Chief Justice Celebrezze became a candidate for partisan office before resigning from the bench).[1]

3. Petitioners assert that fund-raising and other campaign activity continued during the period from the date of his announced plans to run and his resignation from

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1. We show, *infra*, that Ohio Law defines a candidate in a primary as one who has issued a formal declaration, filed petitions, and paid the statutory filing fee before the statutory cutoff date. See pp. 8 to 9, *infra*, and Ohio Revised Code Sections 3513.01 to 3513.10.

the Court. Petition at 19. The record is silent on this point.

4. Petitioners state that the Ohio Chief Justice "stood to gain or lose hundreds of thousands of dollars depending on how his judicial actions affected his campaign" and that he had the "hope of attracting campaign money" from the AFL-CIO. Petition at 16. The record below contains no evidence to support such assertions.

5. Petitioners present a report of the alleged March 8, 1982, conversation with Chief Justice Celebrezze and of the March 9, 1982, proceedings in the Ohio Supreme Court conference room. No record was made of the proceedings and counsel for the Respondents were not present. Petition at 11. Petitioners purport to summarize some of the opinions of the justices, without naming or enumerating the supporters of a position. Petitioners tell us that some members suggested that petitioners present their arguments directly to the United States Supreme Court. Petition at 11. None of these allegations have any support in the record below.

6. Petitioners state that proceedings such as the March 9, 1982 conference are "unprecedented". The record below contains no basis for this assertion.

7. Petitioners allege that Chief Justice Celebrezze resigned and rescinded that action on March 9, 1982. They append two newspaper reports to support those allegations. Petitioners assert that the articles were not part of the record below because they occurred after the petitions for rehearing in *St. Vincent* and *Minster Machine* were filed. Pet. at 12, n.9. The petition for rehearing in *Cincinnati Milacron*, however, was filed later, on March 15, 1982.

8. The "Political Committee Finance Report" dated Nov. 30, 1981, was inserted by petitioners for the first time in the Appendix to its Petition for Certiorari. See Petition at 9, Pet. App. at 164-201. The report is allegedly a public record. On its face, it shows a filing date of Nov. 30, 1981, more than three months before the filing of petitions for rehearing in the three cases.[2]

9. Petitioners argue that the Ohio AFL-CIO and other labor organizations contributed at least $4,000 to the Appreciation Dinner Committee and that the AFL-CIO submitted an *amicus curiae* brief in *Cincinnati Milacron*. Petition at 9. The Report itself shows a contribution from the Ohio AFL-CIO of $100. Pet. App. at 174. The Amicus brief was submitted by the Ohio AFL-CIO. Pet. App. at 203-204.

10. Petitioners assert that the *Minster Machine* case announced a "new standard of strict liability." Petition at 8. In fact, in *Minster Machine*, the Ohio Supreme Court relied extensively on the case of *Leichtamer v. American Motors Corp.*, 67 Ohio St. 2d 456 (1981), see Pet. App. at 66, a case decided only eighteen months before *Minster Machine*. Chief Justice Celebrezze voted with the majority in *Leichtamer* Justice Holmes, dissenting in *Min-*

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2. The campaign report leaves many questions about the facts alleged and implied by petitioners. Petitioners argue on the basis of the report that Chief Justice Celebreeze knew about these contributions and was likely to be influenced by them in his decisions. Indeed, the issue of whether the committee is partisan or nonpartisan does not appear on the face of the document. The bare report is an insufficient basis for such inferences, even if the report were properly before this Court. The alleged contributions were to an "Appreciation Dinner Committee" Pet. App. at 164. We are left to guess about the makeup of the committee, the relationship to the gubernatorial campaign, and the degree of involvement, if any, of the Ohio Chief Justice in any of the activities of the committee. In short, the campaign report, fails to provide a context for the serious inferences which petitioners attempt to draw from it.

ster Machine, acknowledged the similarity of the cases, stating that "I continue to adhere to my position, articulated in my dissent in *Leichtamer*. . . ." See Pet. App. at 74. The *Leichtamer* case in turn followed the decision in *Temple v. Wean United, Inc.*, 50 Ohio St. 2d 317 (1977) which declared strict liability in tort to be the products liability rule in Ohio. Chief Justice Celebrezze wrote the opinion of the Court in *Temple*.

11. In the *Cincinnati Milacron* decision, only two justices dissented from the result. Justice Locher, concurring in part and dissenting in part, agreed with the one paragraph syllabus in the case[3] and with the result—a remand to the trial court.

12. Petitioners state as a fact in the Statement of the Case, that Chief Justice Celebrezze's concurring opinion in *Cincinnai Milacron* has "the unmistakable ring of political speechmaking." Petition at 10. The assertion is opinion not fact.[4] Chief Justice Celebrezze and Justice Brown issued concurring opinions responding to Justice Krupansky's dissent. Pet. App. at 18-22. Justice Brown, wrote *inter alia*: ". . . workers' safety should rank higher on our scale of human values than that rallying cry and maxim: 'Profit is not a dirty word in Ohio.' What's good for workers is good for Ohio." Pet. App. at 22. The record does not show whether Justice Krupansky or Justice Brown were candidates for nonjudicial office.

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3. The syllabus is the only authoritative statement of the law in Ohio judicial opinions. *Cassidy v. Glossip*, 12 Ohio St. 2d 17, 231 N.E.2d 64 (1967).

4. Petitioners fail to cite the dissenting opinion of Justice Krupansky in *Cincinnati Milacron* which predicts "catastrophic results" from the decision. Justice Krupansky argues that the majority decision is an act of "irresponsibility for the benefit of a few (workers)at the detriment of so many." Pet. App. at 27.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

The writ should not be granted here because:

1. The record is devoid of reliable authenticated evidence to support the federal question asserted.

2. The issue presented by petitioners is primarily an issue of state law. Under Ohio law, the Ohio Chief Justice was not a candidate for nonjudicial office.

3. Petitioners did not pursue available remedies at the state level at a time when they first knew or should have known about the ethical issues. Failure to pursue those remedies prior to the outcome of the cases gives petitioners the unfair advantage of knowing the outcome of a collegial decision before raising the issue of disqualification.

4. Petitioners have failed to meet their burden of rebutting the strong presumption of regularity of legal proceedings.

5. Petitioners fail to present a colorable equal protection argument.

1. The Record Is Devoid of Evidence to Support the Factual Allegations or Legal Conclusions Advanced by Petitioners.

The basis for review of a decision of a state supreme court by way of certiorari must be found in the record of that Court. *Securities & Exchange Commission v. Chenery Corp.*, 318 U.S. 80, 87 (1943); *Cardinale v. Louisiana*, 394 U.S. 437, 438 (1969); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 391 (1836). In our Statement of the Case, we have demonstrated the paucity of factual information in the

record below. The constitutional issues were not raised until after the cases were decided. The record is "very likely to be inadequate, since it was not compiled with . . . (the constitutional issues) in mind." *Cardinale v. Louisiana, supra,* 394 U.S. at 438.

The record is absolutely devoid of sworn testimony on the federal questions which petitioners attempt to raise.

Moreover, the petitioners improperly discuss *ex parte* proceedings as part of their Statement of the Case. The same Canons of Judicial Ethics upon which they rely declare unmistakably that *ex parte* proceedings are improper. Canon 3(A)(4), 36 Ohio St. 2d at xxii. The lawyers' participation in such proceedings violates the American Bar Association's Code of Professional Responsibility, which is applicable in Ohio. DR7-110(B), 23 Ohio St. 2d 51-52 (1970); Rule IV, Supreme Court Rules for the Government of the Bar of Ohio, Rules Governing the Courts of Ohio, 577-578 (Anderson 1981). See also Rule VI. *Id.* at 587-588; Appendix, *infra* at A1 to A6-A7. Yet, Counsel for petitioners apparently participated in the alleged conference, failed to insist that a record be made, produced no contemporaneous report of the proceeding, and now seek to use the proceedings to advantage in their supposedly neutral Statement of the Case.[5] The report of the conference is irrelevant to petitioners' legal arguments and seems included primarily for emotional effect.[6] See Petition at 11, 24. Petitioners' indignation about ethical issues seems unduly selective.

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5. Cf. *Markowitz v. Toledo Metropolitan Housing Authority,* 608 F.2d 699, 704 (6th Cir. 1979).

6. The newspaper reports of the alleged resignation of the Ohio Chief Justice also seem designed for emotional effect. The alleged occurrences took place after the denial of the motion for rehearing. Petitioners fail to connect them to their legal arguments.

2. Under Ohio Law, the Ohio Chief Justice Was Not a Candidate for Nonjudicial Office.

Petitioners' constitutional arguments rely on the premise that the Ohio Chief Justice was a candidate for partisan nonjudicial office.[7] The question of whether Chief Justice Celebrezze had become a candidate at any time prior to the disposition of these cases depends on application of Ohio law to disputed and complex facts. Under Canon 7(A)(3) of the Canons of Judicial Conduct, as enacted in Ohio, the question is whether he was "a candidate . . . in a party primary . . . for a nonjudicial office." Because he was allegedly a candidate for the Democratic gubernatorial nomination in Ohio, Ohio election laws govern the definition of candidacy.

Ohio primary election statutes are clear and exacting in their definition of the term "candidate". A person desiring to be a candidate for the office of governor in a primary election shall comply with Section 3513.04 of the Ohio Revised Code not later than four p.m. of the seventy-fifth day before the date of the primary. Ohio Revised Code §3513.05. The primary is held on the first Tuesday after the first Monday in June. Ohio Revised Code §3513.01 (This court can take judicial notice that the deadline for filing the declaration of candidacy was March 24, 1982, more than four weeks after the decision below.)

The specific requirements for becoming a candidate include "filing a declaration of candidacy and paying the required filing fee." Ohio Revised Code §§3513.04 and 3513.10. Petitions signed by registered voters must be in the statutory form and include the declaration of candidacy

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7. Petitioners agree that the issue is one of state law. They assert that their right under 7(A)(3) is a "state-created right". Petition at 20.

prescribed in Section 3513.07. One thousand voters of the same political party as the prospective candidate must sign the petitions. Ohio Revised Code §3513.05.

There is no evidence in the record that the Ohio Chief Justice had complied with any of the above provisions. Under Ohio law, he was not a candidate.[8]

3. Petitioners Waived Their Federal Claims by Failure to Raise Them at the Earliest Opportunity in the State Court.

Petitioners first raised their federal constitutional claims by motion for rehearing to the Ohio Supreme Court. Petition at 10-11. The traditional rule, of long standing application, has been that federal questions must be raised at the earliest possible opportunity or they will be deemed an insufficient basis for the grant of a Writ of Certiorari. *Estate of Wilson v. Aiken Industries, Inc.*, 439 U.S. 877, 879 (1978) (Blackmun, concurring); *Moore v. Illinois*, 408 U.S. 786, 799 (1972); *Cardinale v. Louisiana*, 394 U.S. 437, 438-439 (1969); *Herndon v. Georgia*, 295 U.S. 441, 443-444 (1935); *Central Union Telephone Co. v. City of Edwardsville*, 269 U.S. 190, 194-195 (1925); *Consolidated Turnpike Co. v. Norfolk Ocean View Railway Co.*, 228 U.S. 326, 334 (1913); *Harding v. Illinois*, 196 U.S. 78, 84-85 (1904); *Grame v. Mutual Assur. Soc. of Virginia*, 154 U.S. 676 (1881); *Simmerman v. Nebraska*, 116 U.S. 54 (1885); *Crowell v. Randell*, 35 U.S. (10 Pet.) 368, 397-398 (1836).

Petitioners' filing of a motion for rehearing in the Court below cannot compensate for the failure to pursue

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8. Canon 7(A)(3) has been interpreted as permitting preliminary surveys of financial aid and voter support without becoming a formal "candidate." *Morial v. Judiciary Comm. of Louisiana*, 565 F.2d 295, 301 (5th Cir. 1977). Such an interpretation may be necessary to avoid serious First Amendment issues. *Ibid.* A potential candidate need not "balance a secure judgeship against a complete leap in the dark." *Ibid.*

predecisional opportunities to present the federal question to the state court. *Harding v. Illinois, supra; Grame v. Mutual Assur. Soc. of Virginia, supra; Simmerman v. Nebraska, supra.*

Petitioners had adequate opportunities to present their constitutional claims prior to the Ohio Supreme Court decisions.

Assuming *arguendo* that the Ohio Chief Justice was a candidate for nonjudicial office, the appropriate remedy for a violation of the State Canon of Judicial Conduct is either a motion to disqualify or the initiation of disciplinary processes. Petitioners used neither of these procedures. Instead, they awaited the outcome of the collegial decision making process. Having lost on the merits, they now seek a second opportunity to litigate the same issue.

Petitioners concede that the right which they claim was violated in these proceedings is a "state-created right". Pet. at 20. The Supreme Court of Ohio adopted the Code of Judicial Conduct, effective December 20, 1973. Pet. App. at 1, 36 Ohio St. xix. Rule IV of the Supreme Court Rules for the Government of the Bar of Ohio provides that the Code of Judicial Conduct "shall be binding upon *all* judicial officers of this state." Rules Governing the Courts of Ohio 571, 577 (Anderson 1981) (Emphasis Added). *See also* Rule VI. *Id.* at 587-588.

The Ohio Supreme Court has plenary power to enforce the standards of the Code of Judicial Conduct by virtue of its power to regulate the practice of law and "all other matters relating to the practice of law." Ohio Constitution, Art. IV, §2(g). *Mahoning County Bar Assn. v. Franko*, 168 Ohio St. 17 (1958). The Ohio Supreme Court has promulgated rules whereby complaints may be filed against judges for violation of the Code of Judicial Conduct. Ohio

Supreme Court Rules for the Government of the Bar of Ohio, Rules IV to VI, Rules Governing the Courts of Ohio, 576-588 (Anderson 1981). Since at least 1954, the Ohio Supreme Court has declared by rule that the Canons of Judicial Conduct are "binding on all members admitted to the practice of law in the State of Ohio." *Mahoning County Bar Assn. v. Franko, supra,* 168 Ohio St. at 21. Penalties for violation of the Code of Judicial Conduct include retirement, removal or suspension from office or reprimand, suspension or disbarment from the practice of law. Rules IV, VI, *supra.*

The Ohio Supreme Court has expressed a commitment to monitor the behavior of judges according to the standards of the Code of Judicial Conduct. *Mahoning County Bar Assn. v. Franko, supra,* at 168 Ohio St. at 23. Indeed in that case, the Ohio Supreme Court suspended a judge indefinitely from the practice of law for failure to resign his judicial position before becoming a candidate for prosecuting attorney.

If the copy of the press release dated January 15, 1982, is authentic and reliable, petitioners learned or could have learned the content of that release on that date.

Petitioners could have filed a grievance complaining of the fact that the Ohio Chief Justice continued to serve as a judge while arguably a candidate for Governor.

Moreover, Petitioners, as litigants before the Ohio Supreme Court, had opportunities to protect their own rights in the pending litigation. The Ohio Supreme Court, as shown above, has plenary power to enforce the Code of Judicial Conduct. While there is not a specific rule or statute in Ohio providing for disqualification of an Ohio Supreme Court Justice, the Ohio Supreme Court has the inherent power to consider such a motion.

Petitioners assert that the petition for rehearing was the first available opportunity to raise the issue of disqualification, citing the fact that Ohio's disqualification statutes do not apply to the Ohio Supreme Court. Petition at 11, note 7. The argument does not withstand analysis. The procedure for rehearing does not specifically provide for raising the issue of disqualification, yet petitioners raised it. By the same logic, they could have raised the issue by motion to the Ohio Supreme Court while the cases were pending.

The effect of following any of the above procedures prior to the decisions in the cases under review would be dramatically different. First, the Ohio Chief Justice individually and the other Justices collectively would have had an opportunity to confront the issue before the rights of the parties were affected by a final written opinion. See *Cardinale v. Louisiana, supra* at 439. Second, respondents could have participated in the development of the factual and legal arguments and protected the interests of their clients. Finally, petitioners would have avoided the appearance of "double-dipping" inherent in moving for the disqualification of a justice only after his vote was known to be adverse to them.

This Court should not condone the untimely and unfair litigation of this issue after the merits of each case have been fully litigated and the rights of the parties settled in considered opinions announced by a seven-member court.

4. Petitioners Fail to Meet Their Burden of Rebutting the Strong Presumption of Regularity and Constitutionality in the Legal Process.

Petitioners argue from another[9] faulty legal premise in their due process claim. They subtly attempt to shift the burden of proof by arguing that courts cannot presume that a judge who is a candidate will be impartial on the bench. Petition at 18. The legal standard is exactly the opposite.

Judicial action is presumed to be "unbiased". *Schweiker v. McClure*, ... U.S. ....., 102 S. Ct. 1665, 50 U.S. L.W. 4406, 4408 (1982). One who challenges the actions of a judge "must overcome a presumption of honesty and integrity in those serving as adjudicators." *Withrow v. Larkin*, 421 U.S. 35, 47, 55 (1975). See also *Tumey v. Ohio*, 273 U.S. 510, 517 (1927). This premise is a corollary of the familiar doctrine that governmental actions are presumed to be constitutional. *Fullilove v. Klutznick*, 448 U.S. 448, 100 S. Ct. 2758, 2771-2772 (1980); *Kelley v. Johnson*, 425 U.S. 238, 247 (1976); *Planned Parenthood of Cent. Mo. of Danforth*, 428 U.S. 52, 79-81 (1976); *Flemming v. Nestor*, 363 U.S. 603, 617 (1960).

The test of the constitutionality of the judicial action in this case is whether an average person, sitting as a judge, would be tempted to alter a decision on the basis of nonjudicial considerations. *Ward v. Village of Monroeville*, 409 U.S. 57, 60 (1972). The mere surface appearance of overlapping judicial and executive functions is not sufficient to strike down judicial action on the basis of conflict of interest and due process violations. *Ibid.*

This Court has expressly avoided the creation of a *per se* rule under which all judicial action with a surface

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9. See also Argument 2, *supra* at pp. 8 to 9.

appearance of impropriety would be voided. Practical considerations in a "governmental structure of great and growing complexity" dictate a tolerance for some overlap of functions. *Richardson v. Perales*, 402 U.S. 389, 410 (1971). Considerations of finality of legal decisions also enter into the balance in a case such as this, in which the challenge is raised against one member of a collegial court that has rendered its decision.

In lieu of a *per se* rule, the Court has chosen to rely on careful analysis and balancing, on a case-by-case basis of the likelihood of actual bias and partiality affecting the specific decisions under question. *Schweiker v. McClure, supra; Marshall v. Jerrico, Inc.*, 446 U.S. 238, 100 S. Ct. 1610 (1980); *Withrow v. Larkin*, 421 U.S. 35 (1975); *Ward v. Village of Monroeville, supra; Tumey v. Ohio, supra.* As a starting point for analysis, the party claiming judicial impropriety has the burden of convincing the Court, "under a realistic appraisal of psychological tendencies and human weakness" that the conduct "poses such a risk of actual bias or prejudgment that the practice must be forbidden if the guarantee of due process is to be adequately implemented." *Withrow v. Larkin, supra*, 421 U.S. at 47.

Petitioners attempt to avoid their burden and bypass the legal standard by arguing for a *per se* rule. Their argument would require that the Court rule illegal and void every action by a judge who announced a prospective candidacy for a nonjudicial office. Petitioners' position would require a dramatic reversal of the present standard which requires a "probability of unfairness" and a "probability of actual bias" before adjudicatory behavior will be proscribed on due process grounds. *Ibid.*

Nor can the petitioners meet this burden of proof on the barren record in this case. Indeed, they have failed

to present a single item of authenticated, reliable evidence to support their bald assertions of bias. Even assuming arguendo that some record of "campaign" contributions is properly before Court, petitioners have not met their burden of showing that either the alleged candidacy or the alleged campaign contributions were likely to influence the Chief Justice in his decisions in the three cases under review—or that they would be likely to influence the average person.

In the cases before the Court, the Ohio Chief Justice's votes are entirely consistent with his previous votes on similar issues. In the *Minster Machine* case, Chief Justice Celebrezze's participation in the majority was consistent with his vote in the *Leichtamer* case, decided eighteen months earlier, and with his written opinion in the *Temple* case, decided five year earlier. Similarly, in *St. Vincent Hospital v. Zak*, the decision of the Ohio Supreme Court interpreted the malpractice statute of limitations consistently with prior interpretations. *Hocking Conservancy District v. Dodson-Lindblom Associates, Inc., et al.*, 62 Ohio St. 2d 195, 404 N.E.2d 164 (1980); *Whitt v. Columbus Cooperative*, 64 Ohio St. 355, 415 N.E.2d 485 (1980). See also *Richardson v. Doe*, 176 Ohio St. 370, 199 N.E.2d 878 (1964). In the *Whitt* case, the Court held unanimously that the statutory term "malpractice" was limited to the common law definition (primarily physicians and lawyers). Chief Justice Celebrezze voted with the majority in both cases.

In short, the decisions were independent of the contributions. There is no evidence that the contributions were intended to influence future court decisions or that they would be likely to do so.

Petitioners' argument apparently rests on one of two factual premises. The first is that the campaign contribu-

tions from *amicus curiae*, allegedly given long before the *amicus* briefs were filed, influenced the Ohio Chief Justice's decision in those cases. On its face, this proposition proves too much. If the Court is to presume that a judge discards impartiality by accepting a campaign contribution from an *amicus curiae*, the Court cannot limit that presumption to *non-judicial* campaigns.[10] Petitioners present no psychological principle or evidence that would permit us to conclude that the judge who receives support for a *judicial* campaign is less likely to be influenced by the wishes of campaign contributors.

Based on traditional experiences with campaign contributions, we as a nation have chosen to presume that campaign contributions, without more, do not influence specific votes and decisions. We know that there are scandalous exceptions to this risky proposition, yet we accept the aberrations as a part of the price of democracy. See generally *Buckley v. Valeo*, 424 U.S. 1 (1976).

The second factual premise of petitioners' due process argument appears to be that Chief Justice Celebrezze's alleged announced intention to become a candidate for Governor of Ohio at some future date influenced, or was likely to influence, his votes in the three cases at issue. The underlying assumption is that the announcement would cause him to alter his previous judicial philosophy and mask his legal analysis to present a different face to the electorate. Petitioners fail to address this assumption. We have shown that Justice Celebrezze's votes in these cases were indeed consistent with his prior judicial decisions.

Petitioners rely heavily on the cases of *Tumey v. Ohio*, *supra* and *Ward v. Village of Monroeville*, *supra*. Both

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10. Contributions to judicial campaigns are expressly permitted under Canon 7(B)(2) of the Canons of Judicial Conduct.

of these decisions involved situations in which the judicial officer stood to gain in a direct and immediate way from the decision in the case. In *Tumey*, the benefit to the mayor was the fees and costs paid by a defendant only if convicted. 273 U.S. at 520. In *Ward*, the benefits to the mayor were the fines, forfeitures, fees, and costs which comprised a substantial portion (up to 50%) of the village's revenues.

Ward and *Tumey* are far removed from the cases at issue here. In both *Ward* and *Tumey*, the benefit was directly and immediately dependent on the decision in each case. Upon conviction, the village and the mayor received revenue; upon acquittal, they received none. In the cases under review, there is no such connection. Contributions were made in the past without restrictions. Indeed, it would have been a serious criminal offense to either offer or accept restrictions on the contributions related to future decisions in cases. Ohio Rev. Code §2921.02. *See also* §2921.43. The decisions were issued without any promise of future benefit. In short, our cases do not involve the "direct, personal, substantial, pecuniary interest" in reaching a conclusion against the interests of defendants that was involved in *Tumey*. 273 U.S. at 523.

Finally, *Ward* and *Tumey* are distinguishable because they involved decisions by individual judges. In the case at bar, we have a considered decision, with written opinions, from a collegial court of seven justices. No single justice has the power to govern the outcome. Each justice, in turn, is subject to the checks and balances of collegial decision-making and the issuance of written opinions.

5. The Ohio Supreme Court Afforded Petitioners Full and Equal Protection of the Laws.

Petitioners argue that their "state-created right" to enforce the Canons of Judicial Conduct were abrogated by the procedures in these cases. That right, they assert, is to have all decisions made by judges who have not declared an intent to be a candidate for political office in the future.

There are several fatal flaws in this argument. The first is that petitioners assert not merely the right, but also the remedy. Respondents do not dispute that the Code of Judicial Conduct includes a mandatory directive that a judge who becomes a political candidate resign from the judgeship. Even assuming arguendo that this rule was violated by the Ohio Chief Justice,[11] the Code of Judicial Conduct does not say that any action by a judge sitting in violation of the rule is null and void. Petitioners would have the Court imply a remedy which is not apparent on the face of the Code—a remedy with grave implications for the administration of justice. They would have the Court imply such a remedy under the guise of a "state-created right" without benefits of discussion or relevant precedent.

According to petitioners' count, over 95 cases were handed down during the period between the alleged issuance of Chief Justice Celebrezze's press release and his alleged resignation from the Court. Petition at 6. All these decisions, and countless administrative actions by Chief Justice Celebrezze acting for the entire court (e.g.

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11. Petitioners assume without proof or argument the violation of the rule. They fail to show, or even cite precedent to the effect that, a statement of intent to become a candidate in the future automatically makes one a candidate in the present. See pp. 8-9, *supra*.

granting leaves to file amicus briefs, Pet. App. 204, 209) would be called into question under petitioners' theory. The enormity of the consequences for the administration of justice dictate that the Court look elsewhere for a remedy.

We have shown above, in Section 2, that petitioners had other remedies to protect their right to a decision by a tribunal which met all of the conditions of the Code of Judicial Conduct. They chose, either explicitly or implicitly, to submit their cases to the Ohio Supreme Court as then constituted. The failure to raise an objection before the decisions were known amounts to a waiver of any right to a different decision maker. Even if this Court were to adopt a rule that actions taken by a judge in violation of the Code of Judicial Conduct were void, the Court could not reasonably apply such a rule to a litigant who knew, or should have known, of the defect and chose not to assert it before the decision.

The final problem with petitioners' equal protection argument is that it is not supported by precedent. The cases cited by petitioners are *Mills v. Habluetzel*, 102 S. Ct. 1549, 1551, 1553 (1982); *Gomez v. Perez*, 409 U.S. 535, 538 (1973); and *Griffin v. Illinois*, 351 U.S. 12, 18 (1956). Petition at 22. Each of these cases involved a degree of invidiousness which is not present here.[12]

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12. *Mills* and *Gomez* each involved claims by illegitimates to equal access to the civil justice system to present cases of nonsupport. These decisions evolve from the Court's concern that illegitimacy is "a characteristic determined by causes not within the control of the illegitimate individual, and it bears no relation to the individual's ability to participate in and contribute to society." *Matthews v. Lucas*, 427 U.S. 495, 505 (1976). As such, illegitimacy classifications are entitled to more than "toothless" scrutiny for equal protection violations. *Trimble v. Gordon*, 430 U.S. 762, 767 (1977). *Griffin v. Illinois*, is similarly inapposite. In *Griffin*, the Court struck down on equal protection grounds a state law which denied an appeal to an indigent convicted defendant in a criminal case. The Court in *Griffin* exhibited its traditional concern about the patent irrationality of absolute deprivations based on poverty. *Cf. San Antonio Independent School District v. Rodriguez*, 411 U.S. 1, 23-24 (1973).

Petitioners present no equivalent line of analysis. There is no near-suspect classification here, nor is there an absolute deprivation of some important interest. To the contrary, petitioners have not even experienced a relative deprivation of any interest. They fully litigated the merits of their cases and now claim the lack of a tribunal equivalent to that afforded others. They have had a full and equal opportunity to litigate their claims. They are entitled to no more.

CONCLUSION

The decisions below dealt with issues of state tort law that are important to the individual litigants. Petitioners are dissatisfied with those decisions because of their economic implications. They now attempt to interpose an *ex post facto* challenge to the qualification of one member of a collegial court. The Ohio Supreme Court rendered each decision after full and fair legal argument. This Court should not upset the legitimate expectations of the individual litigants on such a contrived afterthought.

Respectfully submitted,

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APPENDIX

SUPREME COURT RULES FOR THE GOVERNMENT OF THE BAR OF OHIO

Rule IV

PROFESSIONAL RESPONSIBILITY AND JUDICIAL ETHICS

(1) The Code of Professional Responsibility, as adopted by this Court on October 5, 1970, and set forth in 23 Ohio State 2d Reports, shall be binding upon all persons admitted to practice law in the state of Ohio, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio. The Code of Judicial Conduct, as adopted by this Court, effective December 20, 1973, and set forth in 36 Ohio State 2d Reports, shall be binding upon all judicial officers of this state, and the willful breach thereof shall be punished by reprimand, suspension or disbarment, as provided in Rule V, or by retirement, removal or suspension from office, as provided in Rule VI of the Supreme Court Rules for the Government of the Bar of Ohio.

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Rule V

DISCIPLINARY PROCEDURE

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(5) Definitions.

(a) Misconduct. Misconduct shall mean any violation of any provision of the oath of office taken upon

admission to the practice of law in this State or any violation of the Code of Professional Responsibility or the Code of Judicial Conduct as adopted by the Court from time to time, disobedience of these rules or of the terms of an order imposing a suspension from the practice of law, or the commission or conviction of a crime involving moral turpitude.

Rule VI

REMOVAL OF JUDGES

Pursuant to legislative authority provided by R.C. 2701.11 and 2701.12, the following rule is adopted, effective February 11, 1966.

1. (a) The written and sworn complaint required by R.C. 2701.11 shall be filed with the Secretary of the Board of Commissioners on Grievances and Discipline of the Supreme Court heretofore established under Rule V of the Supreme Court Rules for the Government of the Bar of Ohio, who shall transmit such complaint to the Chairman of the Board. Six copies of the complaint shall be so filed. The complaint shall set forth specifically the grounds claimed to be cause for retirement, removal, or suspension of the Judge from office and time when and place where any act, acts, omission or omissions occurred which are alleged to be cause for such retirement, removal or suspension under R.C. 2701.12. Complaints filed by the Committee on Legal Ethics and Professional Conduct of the Ohio State Bar Association and by a Grievance Committee of any regularly organized bar association in the state shall not be accepted for filing unless signed by one or more members of the Bar of Ohio in good standing (who shall be counsel for the Relator) and supported by a certificate in writing, signed either by the Chairman of the Committee on Legal Ethics and Professional Conduct of the

Ohio State Bar Association or by the President, Secretary or Chairman of the Grievance Committee of any regularly organized local bar association in the state (which association shall be deemed the Relator), certifying that such counsel are duly authorized to represent the Relator in the premises and have accepted the responsibility of prosecuting the complaint to conclusion. Such certification shall constitute a representation that, after investigation, the Relator believes that reasonable cause exists to warrant a hearing on such complaint and shall constitute the authorization of such counsel to represent the Relator in the premises as fully and completely as if he or they were designated and appointed by order of the Supreme Court of Ohio, with all the privileges and immunities of an officer of such Court. The complaint may also, but need not, be signed by the person aggrieved by the acts or omissions of the Judge against whom the complaint is filed. Complaints filed by Disciplinary Counsel shall be filed in the name of Disciplinary Counsel as Relator.

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(c) In addition to the cause for removal or suspension of a judge, as provided in R. C. 2701.12, a judge may be removed or suspended from office if he engaged in willful and persistent failure to perform his judicial duties, is habitually intemperate, engages in conduct prejudicial to the administration of justice or which would bring the judicial office into disrepute, or if he has been indefinitely suspended from the practice of law or permanently disbarred.

2. Upon receipt of such written and sworn complaint by the Chairman of the Board of Commissioners on Grievances and Discipline of the Supreme Court, he shall, as soon as practicable, convene such Board and present to it the complaint. The Secretary of the Board of Commis-

sioners shall send a copy of such complaint to the Judge against whom the complaint is made. The Board shall then proceed to investigate the complaint. After completion of this investigation, if two-thirds of the members of such Board affirmatively determine that there is substantial credible evidence in support of the complaint, the Secretary of the Board of Commissioners shall certify to the Supreme Court the result of such investigation. The investigation conducted by the Board of Commissioners shall be private. The Board shall have authority to issue subpoenas for such witnesses as are deemed necessary. Subpoenas may be signed by any member of the Board or the Secretary.

3. The report of the Board of Commissioners on Grievances and Discipline shall be sent by certified mail to the Judge against whom the complaint is made at the same time such report is sent to the Supreme Court.

4. The Supreme Court shall, if the report finds there is substantial credible evidence in support of such complaint, appoint within a reasonable time after its receipt a Commission of five Judges, as provided in R. C. 2701.11.

5. The Chairman of the Commission of Judges appointed to determine the question of retirement, removal or suspension of a judge shall be designated by the Supreme Court. Such Chairman shall promptly after receipt of the notice of his appointment and the receipt of the complaint fix a day for the hearing. Such hearing shall not be in the county seat of the county in which the Judge complained about resides unless requested by the Judge against whom such complaint is made. The Chairman shall determine, in the absence of such request, the place and time of the hearing. The hearing shall be private, with full opportunity for relator and respondent to present witnesses.

6. If the Commission of Judges determines by majority vote that grounds for retirement, removal or suspension without pay have been established by clear and convincing evidence as alleged in the complaint or as provided in R. C. 2701.12 the Commission of Judges shall make such order as in its judgment is necessary and proper. Notice of any order so made shall be sent by registered mail with return receipt to the Judge against whom the finding has been made and the Supreme Court.

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8. Any Judge so retired, removed, or suspended may appeal to the Supreme Court on the record made before the Commission of Judges from the action of the Commission. Notice of such appeal shall be given by the Judge to the Commission of Judges and the Supreme Court within 20 days after his receipt by registered mail of the findings made by the Commission. Thereafter, the time for filing a transcript of testimony, briefs, and the conduct of a hearing shall be as provided in Rule V of the Supreme Court Rules for the Government of the Bar of Ohio.

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10. The Commission of Judges may take testimony in any manner prescribed by the law of the state of Ohio. All rules of evidence shall be observed in the conduct of hearings before the Commission of Judges. The parties may be represented by counsel.

11. The Commission of Judges shall issue subpoenas for witnesses under the seal of the Supreme Court, signed by a member of the Commission of Judges or the Secretary of the Commission.

The refusal or neglect of a person subpoenaed as a witness to obey a subpoena, to attend, to be sworn or to affirm or to answer any proper question shall be deemed

contempt of the Supreme Court, and such person shall be punished accordingly.

12. Costs and expenses herein incurred by the Board of Commissioners and the Commission of Judges shall be paid from the Admissions and Grievance Fund of the Supreme Court, and the Court may order that such fund be reimbursed by the Respondent if the proceeding terminates in retirement, removal or suspension without pay.

13. This Rule and such regulations relating to investigations and proceedings involving complaints and petitions for reinstatement shall be liberally construed for the protection of the public and the Courts and shall apply to all pending investigations and complaints so far as may be practicable, and to all future investigations, complaints and petitions whether the conduct involved occurred prior or subsequent to the adoption of this Rule.

(Amended, eff 1-1-81)

CODE OF PROFESSIONAL RESPONSIBILITY

DR 7-110 Contact With Officials.

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(B) In an adversary proceeding, a lawyer shall not communicate, or cause another to communicate, as to the merits of the cause with a judge or an official before whom the proceeding is pending, except:

(1) In the course of official proceedings in the cause.

(2) In writing if he promptly delivers a copy of the writing to opposing counsel or to the adverse party if he is not represented by a lawyer.

(3) Orally upon adequate notice to opposing counsel or to the adverse party if he is not represented by a lawyer.

(4) As otherwise authorized by law.

CODE OF JUDICIAL CONDUCT

Canon 3

A. Adjudicative Responsibilities

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(4) A judge should accord to every person who is legally interested in a proceeding, or his lawyer, full right to be heard according to law, and, except as authorized by law, neither initiate nor consider *ex parte* or other communications concerning a pending or impending proceeding. A judge, however, may obtain the advice of a disinterested expert on the law applicable to a proceeding before him if he gives notice to the parties of the person consulted and the substance of the advice, and affords the parties reasonable opportunity to respond.

COMMENTARY

The proscription against communications concerning a proceeding includes communications from lawyers, law teachers, and other persons who are not participants in the proceeding, except to the limited extent permitted. It does not preclude a judge from consulting with other judges, or with court personnel whose function is to aid the judge in carrying out his adjudicative responsibilities.

An appropriate and often desirable procedure for a court to obtain the advice of a disinterested expert on legal issues is to invite him to file a brief amicus curiae.

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